Before the
UNITED STATES SENATE
Committee on the Judiciary

In the Matter of	)
COPYRIGHT ROYALTIES: WHERE IS THE RIGHT SPOT ON THE DIAL FOR WEBCASTING	)

TESTIMONY OF THE UNIVERSITY OF LOUISIANA AT MONROE, LICENSEE OF NON-COMMERCIAL RADIO STATION KXUL

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I. INTRODUCTION

The University of Louisiana at Monroe appreciates this opportunity to submit to the Committee written testimony regarding the Copyright Arbitration Royalty Panel ("CARP") Report[1] on behalf of non-commercial educational radio station KXUL. KXUL is staffed principally by student and community volunteers and is administered by the ULM academic Department of Mass Communications within the university's College of Liberal Arts. Mass Communications students may receive academic credit for their involvement with the radio station.

The ULM Mass Communications faculty believes that the thorough understanding of mediated communication necessitates exposing today's students to the use of new technologies, including producing effective content for the Internet. Students' experience gained as the result of KXUL radio's Internet presence and the station's streamed audio programming is therefore a vital part of the complete education of our students. Likewise, KXUL's Internet outreach makes the radio station's programming available to a worldwide audience that would not otherwise be able to experience the messages communicated by our students. The complex issue of copyright licensing has the very real potential to quell our use of this important learning experience.

However, the negative impact of the current statute, as we discuss in this testimony, is not limited to KXUL – the same issues are of concern to scores of other non-commercial radio stations licensed to educational institutions nationwide. Copyright issues have already led a

[1] Rate Setting for Digital Performance Right in Sound Recordings and Ephemeral Recordings, Docket No. 2000-9, CARP DTRA 1&2 (2002).

number of non-commercial education broadcasters to cease Internet retransmissions, and have caused still more to not even consider starting such services. In recent weeks and months many well-capitalized commercial music streaming services have been forced from the Internet, citing the mounting costs of copyright compliance. The Internet retransmission services of non-commercial radio stations are even more vulnerable to a skewed economic model and to oppressive regulations. Without revision, the current statute has a strong probability of stifling the use of the Internet by non-commercial educational broadcasters. As the existing legislation continues to take effect, online music choices are likely to become further consolidated under just a few powerful commercial entities, many controlled by the large recording companies. The drastic reduction of voices on the Internet would diminish content diversity and lessen consumer choices for music-oriented Internet services.

KXUL joined with a number of geographically-diverse educational radio stations to file with the Copyright Office joint comments and reply comments in response to a recent Notice of Recordkeeping for Use of Sound Recordings Under Statutory License ("NPRM"). The KXUL faculty supervisor participated in the latest recordkeeping roundtable hearings conducted by the Copyright Office. KXUL has also submitted comments in response to an inquiry by the House of Representatives' Subcommittee on Courts, the Internet, and Intellectual Property. Our voice was *not* heard, however, by the CARP.

II. COPYRIGHT ARIBITRATION ROYALTY PANEL (CARP) REPORT

A. REPRESENTATION FOR NON-COMMERCIAL BROADCAST STATIONS

Only one entity partially representing non-commercial educational broadcasters, the National Religious Broadcasters Music License Committee ("NRBMLC"), participated for the entirety of the CARP proceedings. The Committee should note that, although membership in the NRBMLC includes non-commercial broadcast stations, its membership is also significantly comprised of commercial radio stations. Therefore, the non-commercial voice represented by NRBMLC in the CARP process was even further diluted.

National Public Radio ("NPR") initially filed notices to participate on its own behalf and on behalf of non-commercial public radio stations qualified for funding from the Corporation for Public Broadcasting ("CPB"), but later reached a private settlement with the Recording Industry Association of America ("RIAA") and withdrew from arbitration.

The CARP report directly notes the difficulty in determining fair royalty rates for retransmissions by non-CPB non-commercial educational broadcasters as a result of the sparse participation in the arbitration process by such services:

> Unfortunately, determination of the willing buyer/willing seller fees for non-CPB affiliated, non-commercial radio stations ('non-CPB broadcasters') presents an extraordinary challenge. Despite admonitions to all counsel from the Panel as early as September 7, 2001 (well prior to the rebuttal phase), the record remains virtually barren respecting such broadcasters. [] The record tells little about

those non-CPB broadcasters that are represented by the NRBMLC, and virtually nothing about those that are not.[2]

Congress thoughtfully provided for a formal arbitration process between copyright owners and entities performing sound recordings. Why, then, did not more non-commercial educational broadcasters avail themselves of this opportunity, and how did this lack of participation impact the outcome of the CARP proceeding?

First, at the time parties were first invited to participate in the CARP process, several legal challenges brought into question the applicability of the statutory license to rebroadcasts by licensed radio stations. KXUL, like many non-commercial educational broadcasters with limited resources, was compelled to await the final outcome from the courts before expending limited finances and efforts toward the rate adjustment proceeding. Second, the immense cost of full participation in the CARP proceedings is far beyond the financial capabilities of small non-commercial broadcasters, even if their efforts were to be aggregated.

Non-commercial educational broadcasters do not have a collective voice to represent them in processes such as the CARP. The CARP Report notes the difficulty national organization NRBMLC experienced in its participation: "NRBMLC struggles mightily to quantify a proposed rate founded in record evidence."[3] The magnitude of the record of the CARP abundantly demonstrates that participation in the arbitration process is clearly beyond the abilities of KXUL. Without the contribution of student-operated radio stations such as KXUL to counter the positions presented by the copyright owners through the RIAA, Congress can have no assurance that the CARP Report satisfies the "willing buyer/willing seller" standard it has established. Indeed, only one perspective from the parties affected – the RIAA's – has been heard in the CARP proceedings.

A number of small entities – including Wake Forest, North Carolina independent community radio station WCPE (FM) – individually attempted to submit focused *amicus curae* briefs to the CARP to explain factors relevant to such parties. Because these *amicus* pleadings can only be accepting if no CARP participant objects, the RIAA's subsequent opposition caused the Copyright Office to reject comments from all of these small parties. That WCPE anticipated presentation of a direct case in the CARP proceedings could cost the station hundreds of thousands of dollars gives support to the concern that the arbitration process is prohibitively expensive for small entities. Even if such small parties were to pool their efforts, the cost of voicing our position is unaffordable; therefore, the CARP process is inherently flawed.

The CARP recognized, and valiantly attempted to accommodate, the unique circumstances of non-CPB-funded non-commercial educational broadcasters – the CARP report recommends a royalty rate specific to the Internet retransmissions of such entities. However, the panel's determination is based exclusively on results of a previous public broadcasting compulsory license CARP report, and not on any evidence submitted in the recent proceedings:

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[2] *Id.* at pp. 89-90.
[3] *Id.* at p. 90.

> RIAA's methodology also suffers infirmities. Absent record evidence supporting a particular rate for non-CPB broadcasters, RIAA 'borrowed a ratio' from the Noncommercial Education Broadcasting Rate Adjustment Proceeding CARP Report. RIAA maintains that the panel awarded ASCAP and BMI approximately one-third of the sum they had requested as a royalty fee for the Section 118 public broadcasting compulsory license, and ASCAP and BMI had based their request on royalties paid by commercial broadcasters. Based upon this ratio, RIAA is 'willing to offer' non-CPB broadcasters a two-thirds discount from the commercial broadcaster rate.[4]

The method the CARP used to determine even the commercial royalty rate is in itself suspect. The entire rate structure recommended in the CARP report is based on a single voluntarily negotiated agreement between the RIAA and Yahoo!, Inc., one of the world's leading Internet portals that also serves as an aggregator of radio station and other Web services.[5] The CARP has in effect bootstrapped a recommend non-commercial royalty fee from a commercial rate that is also bootstrapped. The Committee is no doubt aware that the single commercial agreement on which the entire CARP recommendation was based has not been renewed by Yahoo!, Inc., which reasonably calls into question the use of this agreement as a measure of a willing buyer and willing seller standard. The application of the Yahoo!, Inc. agreement to retransmissions by small non-commercial educational radio stations obviously stretches credulity.

Despite Congress' intention to provide the opportunity for all entities performing sound recordings to participate in the CARP hearings, in reality not all that wished to could. Student-operated radio stations do not have the necessary experience or legal sophistication to represent themselves before such proceedings, and do not have benefit of the financial resources to employ "extraordinarily able counsel."[6] The voluntary negotiation periods and CARP hearings combined have lasted longer than undergraduate students working at KXUL have been enrolled at the university, which disadvantages these students and the station in these important and complicated legal matters. It is self-evident that not all parities having to abide by the judgment of the rate adjustment proceeding have enjoyed an equal voice in its outcome.

B. FAILURE OF THE CARP TO CONSIDER COMPARABLE SITUATIONS

National Public Radio ("NPR") and the RIAA reached a negotiated settlement agreement during a period the Copyright Office suspended the CARP proceedings, between November 9, 2001 and December 2, 2001. This agreement affects only the services of NPR, its member radio stations, and non-member radio stations which are eligible to receive federal funding from the CPB. The CARP Report makes reference to several private agreements with commercial broadcasters, and includes multiple redacted passages from such confidential agreements; however, the panel makes absolutely no references to terms or rates under the NPR/RIAA agreement.

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[4] *Id.* at p. 92.
[5] *Id.* at p. 60.
[6] *Id.* at p. 16.

We suppose this omission to be the result of an express prohibition of disclosure binding the parties to that agreement, including the RIAA; however, we further believe that such a term is arguably contrary to the express intent of Congress. Congress clearly, in plain language, stated in the statute that the Copyright Office *must* consider voluntary agreements when determining the fairness of both the rates and the terms of statutory licenses. The RIAA was keenly aware of Congress' desired purpose when the agreement was struck, yet acted to thwart legislative intent.

The NPR/RIAA agreement, applying to approximately 410 CPB-funded radio stations, is a likely indicator of reasonable rates and terms, under the willing buyer/willing seller standard, for the universe of non-commercial radio stations that are not CPB funded, yet the CARP made no apparent use of this information. Even the smallest CPB-funded stations benefited by the private agreement are characterized by much larger budgets and professional staffs than are student-operated non-commercial radio stations. If limited resources qualify CPB-funded broadcasters for special consideration from the RIAA, student-operated radio stations with even lesser resources are yet more deserving of distinct treatment under the statute.

Congress has required the CARP to consider voluntary agreements when arbitrating statutory licenses, but the statute does not empower the CARP with the tools necessary to realize this end. Because this negotiated agreement resulted from encouragement by the CARP, the panel was certainly aware of its existence and relevance; however, the CARP had no ability to compel the production of this crucial document through interrogatories or subpoena. Indeed, even at the recordkeeping roundtable hearing conducted by the Copyright Office just last week, the RIAA has continued to withhold access to the agreement, despite the Office's stated interest in it.

Congress should also note that while digital performance royalty fees attributable to the stations covered by the NPR/RIAA agreement are funded by federal taxpayer monies administered through CPB, non-commercial educational stations not financed by CPB must pay the new statutory license royalty fees from already meager self-generated budgets.

C. POTENTIAL FINANCIAL IMPACT OF THE CARP RECOMMENDATION

A third major infirmity of the current statute, as strictly interpreted by the CARP, is that arbitration must only evaluate the willing buyer/willing seller standard, and need not measure recommendations based on reasonableness. Regardless, because small webcasters such as KXUL were financially precluded from participation in the arbitration process, the CARP did not have before it information about the likely impact a proposed royalty scheme would have on this class of service.

If KXUL attracted the same size audience to its Internet retransmissions as it does over the air, the digital rights fees recommended by the CARP for KXUL would total more than $15,750.00 per year. Thus, the digital rights fees KXUL would pay for an audience equal in size to its present over-the-air listenership would represent 22% of the station's annual budget for all of its webcast *and* broadcast operations, not including additional new royalty fees sought by

performance rights organizations and not factoring in KXUL's massive costs for complying with proposed new copyright recordkeeping requirements.

By contrast, statutory licenses awarded student-operated non-commercial stations under 17 U.S.C. § 118 for the over-the-air performances of underlying compositions currently total just $543.00 annually, which is a blanket fee independent on the number of works performed or the size of audience served.[7] The *peak* Internet audience KXUL has historically experienced is less than 5% of the station's *average* over-the-air audience. Therefore, even if KXUL eventually pays the minimum annual royalty fee recommended by the CARP, $500.00 annually, the fee will be several orders of magnitude out of proportion with the statutory fees the station already pays composers for the over-the-air performance of the very same musical works.

KXUL is in a better financial position than is typical of non-commercial educational radio stations to accommodate these new costs, suggesting that the relative burden of the recommended fees for other educational broadcasters would be even more devastating. The potential burden placed on student webcasters is not limited to fees disproportionate to available financial resources; the weight for administration of the statutory licenses must also be proportionate to the use of licensed material by student webcasters.

Record labels and artists justifiably call for fair compensation for the use of their intellectual property. However, in the abstract, the Committee can easily be misled about the impact of royalties for individual artists. Even when aggregated, the royalty fees to be collected from the retransmissions by student-operated non-commercial educational radio stations by an individual artist will be quite small. In the specific case of KXUL, the station estimates, based on the CARP-recommended non-commercial rate, a featured artist for the *average* recording receiving year-long airplay by KXUL will receive an *annual* royalty payment of just 36¢. Non-featured artists for the average recording receiving year-long airplay will *collectively* receive an annual royalty payment of just 4¢. Royalties attributable to recordings performed less frequently or not performed for the entire year will be even lower. These figures do not factor in administrative costs to be deducted from royalties by SoundExchange, the unincorporated subdivision of RIAA and designated royalty collection entity. Because KXUL plays recordings from an active library much smaller than is typical of student-operated radio stations, fees generated from other student-operated radio stations would be significantly less in the context of a particular recording. When aggregated, royalty fees generated from student-operated webcasts are not likely to create major income for record labels or artists.

However, the recent process by the Copyright Office to determine recordkeeping requirements reveals that administrative costs for complying with the CARP recommendation will likely drive college webcasters from the Internet, even if the fees alone are not oppressive enough to do the job. As proposed in the NPRM, compliance with the Copyright Office's recordkeeping requirements would cost KXUL thousands of dollars annually, easily unreasonable in the context of the royalty fees proposed to be collected. If college radio stations such as KXUL are forced to leave the Internet, record labels and artists will be deprived of *all* potential royalty fees as well as the promotional exposure they already enjoy.

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[7] 37 C.F.R. § 253.5.

The Committee should note that, although directed by Congress through the statute to do so, the CARP failed to reach a determination of the promotional value to record labels and artists of Internet performances of their works. As a result, the recommended rate structure assigns absolutely no promotional value to the performances by webcasters. Certainly the Members intuitively recognize the imbalance resulting from this shortcoming.

Small-volume webcasters represented by the Internet retransmissions of non-commercial educational radio stations most reasonably should be assessed royalties based on a blanket fee. Otherwise, the cost of administering the royalty payments, both for the copyright owners and for the non-commercial services, will easily exceed the payments themselves. The per-performance royalty proposed by the CARP is obviously inefficient for very small webcasters such as the college radio stations. This is precisely the determination of previous CARP panels, under the Section 118 licenses, for the class of services represented by the same student-operated non-commercial educational radio stations.[8] Such a reasoned proposition was not even considered by the CARP for two reasons already explained above: First, student-operated non-commercial educational broadcasters were not financially able to participate in the arbitration, and second, the CARP interpreted the statute to require consideration of the willing buyer/willing seller standard alone, irrespective of reasonableness.

D. RELATED COPYRIGHT MATTERS

We understand that the Committee's current interest specifically centers on the issue of the arbitration process. Other aspects of the statute as amended under the Digital Millennium Copyright Act additionally endanger student-operated non-commercial educational webcasters. We also believe Congress should consider extending Section 118 provisions currently applicable to student-operated non-commercial educational broadcast stations to the Internet retransmissions by these same stations. We respectfully request that the Committee extends its review to these additional matters and extend to the Members our willingness to discuss these issues.

III. RECOMENDATIONS

A. CARP REPRESENTATION FOR SMALL ENTITIES

We respectfully ask the Committee to develop amendments to Chapter 8 of Title 17 designed to ensure necessary non-profit parties are not excluded from future copyright arbitration proceedings because of prohibitive financial costs. The record clearly demonstrates that the arbitration panel can be seriously hampered in arriving at a fair determination without the complete participation of all of the parties affected. Important perspectives have not been allowed an equitable voice under the current language of the statute.

B. ABILITY OF CARP TO COMPEL TESTIMONY AND EVIDENCE

[8] *Id.*

In order to make meaningful Congress' stated intent to consider comparable privately negotiated agreements, we ask the Committee to work to empower future CARPs with the ability to legally compel parties to produce relevant evendence, such as the secret NPR/RIAA agreement.

C. REASONABLE AND PROPORTIONATE RECOMMENDATIONS

We ask the Committee to clearly establish for the CARP a standard of reasonableness to ensure that future recommendations transcend the willing buyer/willing seller standard – which, in an environment that cannot reflect a true free marketplace due to the highly-concentrated nature of the recording industry, results in artificially inflated royalty fees without reference to the ability of non-commercial educational broadcasters to shoulder the rates and administrative costs proposed. As with the Section 118 statutory licenses, the Members might consider enunciating specific guidance to the CARP with regard to Internet retransmissions by non-commercial educational broadcasters.

III. CONCLUSION

The RIAA has the duty to protect the intellectual property owned by their member recording companies and, because of its status as a Congressionally-sanctioned designated common agent,[9] the intellectual property of musicians in general. There is no doubt that recording company profits are negatively affected by various forms of piracy in the Digital Age; however, there is absolutely no evidence that Internet retransmissions by KXUL and other non-commercial educational broadcasters erode copyright owners' earnings in any way. If anything, the retransmissions by non-commercial educational radio stations enhance profits for recording companies, musicians, composers, and lyricists.

We generally agree with the premise that writers, recording artists, and recording companies should each be paid fair and reasonable compensation – in the form of financial payments or in promotional value – for the public performances of their works. The current statute is insufficient to ensure copyright royalty regulations and attendant fees are both fair and reasonable for each the copyright owners and digital services such as KXUL that perform licensed recordings. Shortsighted legislation, albeit well intentioned, easily has the potential to halt this new medium in its infancy.

All Internet programming suppliers, other than the RIAA member major recording companies themselves, are likely to be mightily challenged in the economic environment created by the present language of the Copyright Act. The Internet retransmissions of non-commercial educational broadcasters operating without federal funding will be decimated with the anticipated implementation of the current language within the statute. Without changes, the Copyright Act will force radio station KXUL to cease its Internet retransmissions. Numerous other non-commercial educational broadcasters will fare no better. The resulting reduction of

[9] 17 U.S.C. §114(e)(2)(A).

Internet content providers will appreciably diminish the diversity of services and will lessen consumer choices.

Congress can easily follow precedent to enact an evenhanded and practical solution that will ensure all non-commercial educational broadcasters are able to continue providing valuable public service, while still guarding the financial welfare of the copyright owners.

Respectfully submitted,

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